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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1622

ALMA F. ANDERSON, DIANA BARCLAY,
BETTY JEAN B. NEILSEN and
PARKER M. NIELSON,

Petitioners,

v.

SALT LAKE CITY CORPORATION and
SALT LAKE COUNTY, UTAH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS' POSITION

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TABLE OF CONTENTS

Page

FOREWORD 1

ARGUMENTS:

I. Facts, Ineluctable Facts, Refute the Three Reasons Petitioner Urges for Review 5

II. The Ten Commandments Code of Law Is Historico-Legal, a Cultural Heritage and Serves a Primary Secular Purpose 6

III. Serious Dangers Inhere in Litigation in Which Establishment Is Compulsively Assumed 7

IV. History, Incontrovertible History, Supports the Legality of This Monument 9

V. Monuments Are First and Ninth Amendment Expressions of the People 10

VI. The Opinion's Claim That the Monument Violates the Liberty and Equal Protection Clauses of the Fourteenth Amendment Lacks Substance 11

VII. The Opinion's Absolutistic Posture on Establishment Is Untenable and Unsupported in History or by Authority 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases:

Abington School Dist. v. Schempp - See School Dist. of Abington Twp. v. Schempp below 2, 5, 10, 15, A-9

Allen v. Morton, 333 F. Supp. 1088 (U.S.D.C., D.C. 1971) 3, 5, 11

Anderson v. Salt Lake City Corporation, 348 F. Supp. 1170 (D.C., Utah, 1972) 2, 7, 8, 11

Aronow v. United States, 432 F.2d 240 (C.A. 9, 1970) 4, 8

Calvary Bible Presbyterian Church v. Board of Regents, 439 P.2d 189 (Wash. 1967), cert. den. 393 U.S. 960 7

Engel v. Vitale, 370 U.S. 421 (1962) 4, 15, A-9

Epperson v. Arkansas, 393 U.S. 97 (1968) 15, A-9

Everson v. Board of Education, 330 U.S. 1 (1947) .. 2, 5, 13, 14

In re Opinion of the Justices, 9 N.E.2d 753 (Mass. 1937) 10

Lemon v. Kurtzman, 403 U.S. 603 (1971) 2, 3, 5, 15

Lincoln v. Page, 241 A.2d 799 (N.H., 1968) 9

Lowe et al. v. City of Eugene et al., 254 Or. 518, 451 P.2d 1117, op. withdrawn 254 Or. 534, 459 P.2d 222, 254 Or. 539, 463 P.2d 361, cert. den. and app. dism. sub nom. Eugene Sand and Gravel v. Lowe et al., 397 U.S. 591, 1042, reh. den. 26 L.Ed.2d (1970) 1, 2, 4, 16, A-8, A-11

McCollum v. Board of Education, 333 U.S. 203, 303 (1948) 4, 9, 15, A-9

McGowan v. Maryland, 366 U.S. 420 (1966) . 4, 14, A-10, A-11

Meyer v. Oklahoma City, 496 P.2d 597, cert. den. U.S. Sup. Ct., Nov. 6, 1972 ..... 1, 3, 10, 11, A-10

Parsons v. Van Wyck, 56 App. Div. 339, 67 N.Y.S. 1054 (1906) 11

Paul v. Dade County, 202 So.2d 833 (Fla. Ct. App., 1967), cert. den. Fla. Sup. Ct. 207 So.2d 690, cert. den. 390 U.S. 1041 (1968) 1, 3, 11, A-10

Paul and Feder v. Dade County, 419 F.2d 10, cert. den. U.S. Sup. Ct., Docket 1344 (1970) 1, 3, 11, A-10

People v. Woody, 394 P.2d 813, 817 (Cal., 1964) 13

Reichwald v. Catholic Bishop of Chicago, 101 N.E. 266 (Ill., 1913) 8

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 2, 5, 10, 15, A-9

Singelmann v. Morrison, 57 So.2d 238 (La. App. 1952) 3

Thomas v. Daughters of Utah Pioneers, 197 P.2d 447 (Utah, 1948) 16

Tilton v. Richardson, 403 U.S. 672 (1971) 15, 16

Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) ..... *passim*

Yale University v. Town of New Haven, 71 Conn. 316, 42 A. 87, 92 (1899) 9

Zorach v. Clauson, 343 U.S. 306 (1952) 5, 8

Constitution of the United States:

Amendment I, Religion proviso 2, 3, 10, A-3

Amendment IX 10

Amendment XIV 11, 12

Treatises:

Black, *Handbook on Interpretation of the Laws*, 25 (West. Pub. Co.) A-10

Law Review Articles:

Coughlin, *Religion and the Public Order*, Vol. 5 (1969) A-11

Drinan, State Aid to Church-Related Colleges, 1967 Utah L.R. 491, 514 14

Giannella, "Religious Liberty, Non-Establishment and Doctrinal Development, Part II," 81 H.L.R. 513, 521 (1968) 14

Griswold, "Absolute is in the Dark", 8 Utah L.R. 167 (1963) 16

Katz, "Radiations from Church Tax Exemption," 1970 Supreme Court Review, 93 5

Periodicals:

Time, Dec. 11, 1964, p. 59 17

Books:

Carey, *The Oregon Constitution* (Oregon State Printing Plant, 1924) A-10

Freund, Sutherland, Howe and Brown, *Constitutional Law*, Vol. II, 1453 (Little, Brown & Co., 1954) 4

Friedrich, *Nomos IV*, 262-273 (Atherton Press, 1962) 15

Oakes, *The Wall Between Church and State*, 21 (U. of Chicago Press) (1963) 4

INDEX TO APPENDIX

Appendix A	Letter of Thomas Jefferson to the Danbury Baptist Association, January 1, 1802 (The "Wall of Separation" Statement)	A-1
Appendix B	Letter of Thomas Jefferson to Levi Lincoln; plus an important discovery . . .	A-2, A-3
Appendix C	Oregon's missing Establishment provision	A-4, A-5
Appendix D	Eugene, Oregon, Charter Amendment . .	A-5, A-6
Appendix E	1970 List of Federal and State cases	A-7
Appendix F	Background of Lowe; Critique of December 1969 opinion in Lowe v. City of Eugene, 463 P.2d 361	A-8, A-11

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FOREWORD

The records of this Court show that consent of all parties to appearance of Amicus has been timely filed. By way of introduction Amicus has participated in two prominent monument cases, *Lowe* and *Meyer*, on the side of constitutionality, and collaborated with county's counsel in a third, *Paul.* This participation, plus the considerable research and material gathered throughout the states, may be of value to this Court—to the end that

no important issues be overlooked or germane guides go unnoticed.

A Federal District Court in Utah ruled a 3' x 5' granite Ten Commandments tablet on court house grounds violative of the religion proviso of the First Amendment. This ruling was reversed by the Tenth Circuit Court of Appeals in an opinion written by The Honorable Alfred P. Murrah. This brief, in support of the position of the City and County, urges that the petition be denied.

The opinion of the District Court at 348 F. Supp. 1170, consists of 15 2/3 pages. Thirteen of these are devoted to the *Everson* dissent, Madison's Remonstrances, and the Virginia Bill. The balance is devoted to the facts of this case, the application of the law, the problem of standing and the Schempp case.

Amicus submits that the *Everson dissent* is not the law of the land, and that the Remonstrances are totally inapplicable and were aimed at the use of the taxing power for the benefit of established churches or specific sects. What Jefferson truly meant by "separation between church and state" is clearly explained in Appendix B, his little-known letter to his Attorney General, Levi Lincoln, on the same date that he wrote the Separation letter to the Danbury Baptists (Appendix A).

Absolutistic and doctrinaire interpretations of the federal religion proviso are not the techniques of today's Supreme Court. Mr. Chief Justice Burger, in *Walz*, warned against giving too much credence or emphasis to such matters as Mr. Justice Black's broad, sweeping "No Aid" dictum. Said Mr. Chief Justice Burger, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> "Our prior holdings do not call for total separation between Church and State; total separation is not possible in an absolute sense. Some relationship

between Government and religious organizations is inevitable."

"Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall' is a blurred, indistinct and variable barrier, depending on all the circumstances of a particular relationship."

. . . . "Religious values pervade the fabric of our national life."

Madison recognized a "line" of separation in 1832, in a letter to the Reverend Jasper Adams. In *Walz*, Mr. Chief Justice Burger also talked of a "line" and Mr. Justice Harlan spoke of a "channel." Mr. Justice Jackson spoke of a serpentine wall, like the low, winding stone one which Thomas Jefferson created in one of his famous architectural gems—the University of Virginia.

The "root-and-branch" theory, heavily relied upon by the lower court, applied to the monolithic Established Church, which created strong fears in 1789. That fear, however, has long given way in history to the checks and balances of a pluralism of sects and voluntarism.

Monuments have existed as part of our cultural heritage from the days of the Pharaohs and have universally been accepted as part of the civil polity. It is submitted that the unfinished *Lowe* case in Oregon is not a precedent, but that, rather, such cases as *Paul, Meyer, Singelmann, Allen v. Morton* and others listed in Appendix E, reflect that monuments truly belong and are not ministries of Establishment as claimed in the lower court opinion.

It is submitted that the Ninth Circuit Court of Appeals, in *Aronow v. United States,* ruling that the national motto, "In God We Trust" on currency, did not violate the Establishment Clause, properly relied on *McGowan v. Maryland,* 366 U.S. 420, as a strong

authority. Both the December 19, 1969 *Lowe* opinion and the lower court, in this case at bar, have ignored or by-passed *McGowan*, which, it is submitted, is the law of the land and a vitally active precedent. Witness the language of the Ninth Circuit Court of Appeals in *Aronow*. See also the opinions of Mr. Justice Reed in *McCollum*, of Mr. Justice Douglas and Mr. Justice Stewart in *Engel v. Vitale* and the comment thereon by Robert M. Hutchins in Oakes, *The Wall Between Church and State*, 21. (U. of Chicago Press, 1963.)

The following quotation from Freund, Sutherland, Howe and Brown, *Constitutional Law*, Vol. II, page 1453 (Little, Brown & Co., 1954) is succinct, but speaks volumes:

> "The accuracy and sufficiency of Mr. Justice Rutledge's examination of the history which produced the First Amendment have been questioned by scholars, theologians, polemicists, and judges. See e.g., Corwin, The Supreme Court as National School Board, 14 Law & Contemp. Prob. 3 (1949); Parsons, The First Freedom: Considerations on Church and State in the United States (1948); O'Neill, Religion and Education under the Constitution (1949); Desmond, J., in *Zorach v. Clauson*, 303 N.Y. 161, [8] (1951). It has also been defended. See, e.g., Konvitz, Separation of Church and State: The First Freedom, 14 Law & Contemp. Prob. 44 (1949); Pfeffer, Church, State and Freedom 118-159 (1953)."

ARGUMENT

I.

FACTS, INELUCTABLE FACTS, REFUTE THE THREE REASONS PETITIONER URGES FOR REVIEW.

(1) The monument serves a primary purpose and effect and is not "religious activity" proscribed by the religion proviso.

Arguments based on broad concepts of the wall of separation developed in *Everson* must now be viewed in a more mature frame as expressed in *Walz*, where this Court did not even use the *Schempp* test. See 1970 Supreme Court Review 93. Madison's Memorial and Remonstrances are not now and never have been a part of the First Amendment. Establishment means keeping the state out of the business of establishing religion–i.e. putting the state behind the rites, ritual, worship of any one religious sect.

(2) The argument that "all or substantially all religions are benefited" is invalid.

This Court, in *Zorach* and *Walz*, has amply demonstrated (a) that accommodation (if this be such, arguendo) is here to stay, and (b) its avowed and stated purpose of avoiding hostility to religion.

(3) There is no "conflict between the circuits" as to whether "purpose" and "effect" are questions of law or fact.

This Court in a series of cases–*Schempp*, *Allen*, and *Lemon*–reviewed the issues as questions of law. Mr. Justice White expressly commented on the meagerness of the record in *Allen*. Moreover, as mentioned supra, this Court did not find it desirable or necessary to use the Schempp test in *Walz*.

II.

THE TEN COMMANDMENTS CODE OF LAW IS HISTORICO-LEGAL, A CULTURAL HERITAGE AND SERVES A PRIMARY SECULAR PURPOSE AND EFFECT.

The Ten Commandments reflect the very basis of our American legal system, as well as that of the civil law of Europe. Both systems have been moulded for hundreds of years in reliance on their theme. The first three Commandments cover man's obligations to God, but the remaining and *predominant* number of the Commandments deal with man's secular duties toward man, and have been bodily carried into our own law. The Salt Lake City tablets do not state the Commandments in full, but are abbreviations of some of them. The second, third and fourth are abbreviated. See Exodus XX: 1-17.

Usually the definition of religion associates with it rewards and punishments, but only number 4 here indicates anything akin to a reward. Applying the Schempp test of primary purpose and effect, the Code deals predominantly with duties to man, which are secular. Numerous of the provisions, such as the prohibition against theft, killing, adultery and perjury, form the basis of our present civil law. The last two Commandments, dealing with coveting, constitute safeguards against the actual commission of such unsocial action, and are predominantly secular.

That the Commandments arose out of religion is not any ground for condemning them. Their value is essentially historical and to emphasize the moral foundations of the law. What more proper justification for their inclusion on City Hall or Court House grounds? What are more natural, fitting and appropriate places than City and

County Courthouses for repositories of the law and historical antecedents?

If it is appropriate for students in our public schools to study the Old Testament readings as literature, it becomes no less a secular purpose when they are engraved in stone on Court House grounds. See *Calvary Bible Presbyterian Church v. Board of Regents,* 436 P.2d 189 (Wash. 1967), cert. den. 393 U.S. 960.

Mr. Chief Justice Warren, speaking at a dedication of one of the wings of the National Cathedral in the late 1950's, spoke of religion being the subsoil of our justice. Codes antedating Alfred's, and long before Christianity, show strong religious bases.

III.

SERIOUS DANGERS INHERE IN LITIGATION IN WHICH ESTABLISHMENT IS COMPULSIVELY ASSUMED.

The facts in the opinion of the District Court are all interpreted to give the monument the glow and tincture of Establishment. As pointed out in II, supra, the Code has a predominant or primary secular purpose and effect. Important is the fact shown that *the Code is given in furtherance of a youth guidance program.* See 348 F. Supp. at 1172. This underlines the secular moral or ethical purpose, and demonstrates the high desirability of the State fostering the inculcation of noble, ethical, secular values as desirable for citizenship, especially the upbringing of its youth. There is no showing that the suggested program of dedication set out at 348 F. Supp. 1171-1172 is mandatory. There is no showing that the city and county records treat this monument as a religious monument. There is no showing that this Code is identified with a particular sect which is favored by the State.

The symbols used on the tablets have universal acceptance. Some are used by lodges and fraternal organizations. The All-Seeing Eye appears on the back of our dollar bill and is on the reverse side of our national seal. The opinion in no way sets out what the "law" is which is claimed to be proscribed or forbidden. We honor "In God We Trust" on our coins (*Aronow v. U.S.*, 432 F.2d 242 (C.A. 9, 1970)), on a plaque in back of the Speaker's rostrum in the Capitol. We have a Meditation Room between the House and Senate, complete with two large Jewish Menorah, the Bible, prayer benches, an altar, a stained glass window showing Washington kneeling at prayer, with a St. Andrew's cross in the background. Senator Javits was the first to urge utilizing this room for formal services. We have frequent services in the White House. "We are a religious people," said Mr. Justice Douglas in *Zorach v. Clauson* in the early 50's and the President, today.

Especially important is the fact that the Order of Eagles, in the words of Judge Ritter, "*donated* the stone monument and paid the expense of erecting it." In the words of *Reichwald v. Catholic Bishop of Chicago*, 101 N.E. 266 (Ill., 1913), the city gave nothing, but actually received something. Since this was a gift, the title has passed to the city. Nothing is being maintained by any religious sect, nor is there any specific appropriation or aiding. The city ground is there whether or not the item is displayed upon it. The acceptance of a gift from a secular group does not constitute endorsement of any religion any more than the using on a United States Postage Stamp (Madonna and child) of a religious picture constitutes endorsement of religion by the United States, or a local church with cross atop it portrayed in part of a mural in Eugene, Oregon's City Hall Council Chamber.

The State of California does not endorse the Catholic religion simply because certain early Catholic missions are under supervision of its state park system, nor does San Francisco endorse Buddhism by acceptance of a large statue of Buddha, complete with a Wheel of Life symbol, from its sister city in Japan. Decoration does not constitute adoption.

This Ten Commandments tablet involves *none* of the usual Establishment practices:

(1) No compulsion to attend religious services or to accept any dogma, rites or ritual.

(2) There are no official confessions of faith.

(3) There are no impositions of tithes or taxes for churches or ministers.

(4) There are no criminal punishments or civil disabilities for religious dissenters.

IV.

HISTORY, INCONTROVERTIBLE HISTORY, SUPPORTS THE LEGALITY OF THIS MONUMENT.

(1) The preeminent traditions and customs of monuments, predate Christianity, going back thousands of years to Egypt. Monuments, like certain tax exemptions given public buildings and private places of worship, imply public benefit, serve public good and happiness. As such, they are "inseparably interwoven with the structure of government and the habits and convictions of our people." Cf. *Yale University v. Town of New Haven*, 71 Conn. 316, 42 A. 87, 92 (1899). See Mr. Justice Reed in *McCollum v. Board of Education*, 333 U.S. 203, at 303.

Monuments belong and are of far more ancient vintage than bus transportation, Bible reading, or prayers in public schools. "The power of precedent is the power of

the beaten track," said Mr. Justice Cardozo. The antiquity and the universality of the practice would, indeed, take a strong case to bring it within the First Amendment. See statement of Mr. Justice Holmes cited in *Lincoln v. Page*, 241 A.2d 799 at 800 (N.H., 1968).

(2) Here is permissibility with barely a single adverse judicial precedent under State and Federal Constitutions, among cases fully completed.

(3) This monument, and monuments in general, are not, in fact, a series of steps toward the establishment of a national religion. The tradition, custom and practice is deeply interwoven into the civil polity and accepted by the people. See *Schempp*, 374 U.S. 203, at 303.

(4) Monuments reflect the culture and the common places of community. Grounded in history and heritage, monuments are part of the culture of the community and community life. Recognition of religion is not religion qua religion or religion per se, nor is it proscribed by the Federal Constitution. *In re Opinion of the Justices*, 9 N.E.2d 753 (Mass. 1937).

The briefs of Amicus in *Meyer v. Oklahoma City*, supra, set forth additional supporting material.

V.

MONUMENTS ARE FIRST AND NINTH AMENDMENT EXPRESSIONS OF THE PEOPLE.

Monuments are a part of the people's cultural expression, of their First Amendment rights to speech, press, association, of their right to happiness. Individuals, under the First and Ninth Amendment zones, have the rights to live in, and enjoy life in a community, to use public facilities, to engage in political and social activity. Permanently recurring, year after year, fiesta celebrations

of old mission days in California cities are not establishments of religion. The right to have monuments and memorials commemorating civic aspirations, accomplishments or events in a cultural, political, social, historical, religio-cultural, patriotic or aesthetic framework on publicly owned property is well settled. (Parks, squares, buildings) *Parsons v. Van Wyck*, 67 N.Y.S. 1054, 56 App. Div. 339 (1900), *Allen v. Morton*, 333 F. Supp. 1088, *Paul v. Dade County*, 202 So.2d 833, cert. den. 390 U.S. 1941 (1968).

The "preliminary arrangements" mentioned by the District Court, 348 F.Supp. at 1171-1172, are of no more significance than the fact pattern in *Meyer v. Oklahoma City*, supra.

The record is barren of any religious exercises, silent as to devout crossings, prayers, genuflections or one single indicia of religious worship. Things become holy by association with things holy, said the theologian, Tillich.

VI.

THE CLAIM THAT THE MONUMENT VIOLATES THE LIBERTY AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT LACKS SUBSTANCE.

(1) The facts are barren as to any showing that anyone's liberty has been taken or infringed, or that there is any threat to circumscribe anyone's liberty—either personal or religious. Before a claim can be made, facts should be asserted demonstrating such denial.

(2) It is submitted that the invocation of the Equal Protection clause is inapropos because there are no facts asserted to show any claimed invidious discrimination. At 348 F. Supp. 1180, the Court, in its "unsightly cemetary" argument, erects a straw man and then proceeds to

knock it down. No facts in the opinion support the assumption of the Court that there would be any proliferation of monuments.

Such is a typical argument used in monument cases by those assailing legality. Cities and counties and states have a reasonable say as to what may go on the property, and as long as the monument remains in the "gift" class, the city has a right to accept or reject it. Gifts of art tend to be individualistic and usually complement, rather than jar, the setting.

San Francisco's Golden Gate Park contains a 50-foot Prayer Cross, a beacon cross over 100 feet, a figure of Father Serra with cross, a statue of St. Francis, a totem pole, and a large statue of Buddha. The Young Museum therein contains innumerable works of religious art. Rather than being an "unsightly cemetery", it is one of American's most beautiful composites of blended culture, tradition and heritage.

City halls and county buildings are natural repositories for law. New Haven, Connecticut, is reported to have a statue of Moses with the Ten Commandment tablets in hand on public property.

In the Ceremonial Court Room of the United States Court House in Washington, D.C. appears a large figure of Moses, one hand with finger raised; the other, holding the Tablets. Many small crosses appear on the decorative patterns of the doors. A cross and what appears to be Tablets decorate the top of a monument in the curtilage of this Court House. Above the chair of the Chief Justice, on the frieze, in center stage, so to speak, in the Courtroom of the Supreme Court of the United States, is the figure of Moses holding the Tablets.

Numerous cities, counties and state capitols over the land have Ten Commandment tablets. It is inconceivable

that any city or county would refuse gift of a tasteful and fitting statue or monument recognizing the giving of laws, such as King Alfred, Solon, Moses, Justinian, the Code of Hammurabi, the Magna Charta, the Petition of Rights, or other code or landmark charter.

The three pence tax idea (Madison took this from the three pence tea tax which occasioned the Boston Tea Party) has no germane application to the case at bar. The matter is answered by asking, "Who is taxing whom for what?" We do not need to be concerned that monuments will become a "raging torrent". In over 5,000 years, where have there been undue proliferations of monuments? Not one, single, solitary place has been cited.

Mr. Justice Tobriner in *People v. Woody*, 394 P.2d 813, 817 (Cal., 1964), states that "the varying currents of our subcultures that flow into the main stream of our national life give it depth and beauty." This is true of monuments.

VII.

THE LOWER COURT'S ABSOLUTISTIC POSTURE ON ESTABLISHMENT IS UNTENABLE AND UNSUPPORTED IN HISTORY OR BY AUTHORITY.

(1) The absolute no-aid theory of Mr. Justice Routledge, in the *Everson* dissent is not the law. And Mr. Justice Burger, in *Walz*, referring specifically to Mr. Justice Black's "no-aid" dicta, shows the danger of such generalizations in dicta. We have moved from a "wall" to a "line". Madison himself came to adopt the "line" theory in 1832; and in *Walz*, both the Chief Justice and Mr. Justice Harlan used like or similar terms.

(2) The Remonstrances are neither statutes nor the Constitution and are totally inapplicable. No one is being

compelled to pay a tax to support religious activities. The state is not being used as an instrument to *compel* exercise, worship, ritual or creed. It taxes nothing; it demands nothing. Mr. Justice Douglas, in dissent in *McGowan v. Maryland*, 366 U.S. 577-579, most clearly states the real significance of the Virginia tax:

> "In large measure, the history of the religious clause of the First Amendment was a struggle to be free of economic sanctions for adherence to one's religion. (*Everson*) A small tax was imposed in Virginia for religious education. Jefferson and Madison led the fight against the tax * * * As a result, the tax measure was defeated and, instead, Virginia's famous 'Bill for Religious Liberty', written by Jefferson, was enacted."
>
> "The reverse side of an 'establishment' is a burden on the 'free exercise' of religion. Receipts of funds from the State benefits the established church directly, laying an extra tax on nonmembers benefits the established church indirectly * * *"

(3) "Separation" as used by Jefferson in his "wall" letter (figure of speech in a letter, not a law, not a constitutional provision) meant the Exercise provision. Thus, a contemporaneous letter to Levi Lincoln (his Attorney General) treats of the Establishment provision. There he talks of "alliance between Church and State" (capitalized)–and he meant the Established Church of the day. See Appendix B.

(4) The courts appear never to apply the Establishment provision in isolation. They take the Exercise Clause into account. Giannella, 81 H.L.R. 513, 521 (1968); Drinan, 1967 Utah L.R. 491, 514.

(5) Monuments in no way significantly affect religious liberty. Said the late Mark DeWolfe Howe, a clerk

of Mr. Justice Holmes and later a leading church-state authority at Harvard Law School:

> "[The] religious clauses were adopted in order that the nation's authority should never be brought on matters which were not of *national* concern." See essay in *Nomos IV* by Friedrich, 262, 266 (1962).

(6) Accommodation is here to stay. The lists of aids to the state is long and impressive. The aid proscribed is not all aid, but that aid which performs "ecclesiastical functions." See Mr. Justice Reed in *McCollum*, 333 U.S. at 246.

(7) Monuments are local matters to be handled at a local level.

(8) The Supreme Court closely scrutinizes, in Establishment claims, the "excessive entanglement" with religion. This is clear from *Walz, Lemon* and *Tilton*.

(9) The school cases (*McCollum, Schempp, Engel, Epperson*) *all* involve religious instruction and worship (Exercise) as well as the Establishment factor and involve young people of plastic minds and not adults. They are clearly distinguishable.

(10) We have come from the "wholesome neutrality" of *Schempp* to the "benevolent" neutrality of *Walz*, to the "excessive entanglements" test in *Walz, Lemon* and *Tilton*. If "no aid" were the test, as the District Court contends, why were the adjectives "wholesome" and "benevolent" used? Why was the "excessive entanglements" test added?

CONCLUSION

This monument is not representing the City, a religion per se or a church. It is not sponsored by a church or sect; it is not an object of worship, nor in a situs of

worship. No governmental body is being used as the instrument of a church. There is no aid to any church or religious sect, no control of government over religion or vice versa, no compulsion to use or to view or to worship, to underwrite or to pay taxes for. There is no sponsorship, maintenance or support (financial)[1] by any religious group of any description and no authority delegated by a governmental body to a church or sect or to religion qua religion. Recognition is not religion. Decoration is not indoctrination. Decoration is not endorsement. See *Thomas v. Daughters of Utah Pioneers*, 197 P.2d 447 (Utah, 1948).

The essence of what is to be feared is this: the State's putting itself behind and favoring the rites, rituals, worship of any one sect. Such is the message of Thomas Jefferson in his letter to Levi Lincoln.

We must beware lest a miniscule minority sweep away the rights of the vast majority. Griswold, "Absolute is in the Dark," 8 Utah L.R. 167 (1963). Tradition should mean much. In *Walz*, Mr. Justice Brennan states:

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[1]Words used by the writer in *Lowe* brief in 1967, p. 167. In 1970 in *Walz*, 397 U.S. 398, Mr. Chief Justice Burger wrote:

> "It is sufficient that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connote sponsorship, financial support and active involvement of the sovereign in religious activity."

In *Tilton v. Richardson*, 29 L.Ed.2d 798, 799, the Court considered *four* questions:

> "First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive governmental entanglement with religion? Fourth, *does the implementation of the Act inhibit the free exercise of religion*?"

> "The more longstanding and widely accepted a practice the greater its impact upon constitutional interpretation."

Monuments, as well as church tax exemptions, should be "accepted as a matter of course", in the words of Mr. Justice Harlan in *Walz*. See also 374 U.S. at 423. Professor Freund, with acuity points out, in *Time*, December 11, 1964, p. 59:

> "It is hard to see how such things can be challenged in law so long as they are not addressed to a captive audience and do not call for a profession of commitment or rejection on the part of those who witness them."

Monuments such as this are graven into the civic polity. It is well recorded in Proverbs 22:28—Remove not the ancient landmark, which thy fathers have set. In the respected words of Judge Murrah's opinion "wholesome neutrality" does not "dictate obliteration" of this "passive monument," and this is the common "sense and sensibility" of the matter, to paraphrase a book title from the gentle Jane Austen. The petition should be denied.

Respectfully submitted,

WARREN CAMERON
4034 85th Street, S.E.
Mercer Island
Seattle, Washington 98040
Amicus Curiae Pro se

APPENDIX "A"

LETTER OF THOMAS JEFFERSON TO THE DANBURY BAPTIST ASSOCIATION JANUARY 1, 1802

Gentlemen:—The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem.

From Koch and Peden *The Life and Selected Writings of Jefferson*, pp. 332-333 (Modern Library, N.Y. 1944).

APPENDIX "B"

LETTER OF THOMAS JEFFERSON TO LEVI LINCOLN, HIS ATTORNEY GENERAL.

Jan. 1, 1802.

Averse to receive addresses, yet unable to prevent them, I have generally endeavored to turn them to some account, by making them the occasion, by way of answer, of sowing useful truths & principles among the people, which might germinate and become rooted among their political tenets. *The Baptist address, now enclosed, admits of a condemnation of the alliance between Church and State, under the authority of the Constitution.* It furnishes an occasion, too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings, as my predecessors did.

The address, to be sure, does not point at this, & it's [sic] introduction is awkward. But I foresee no opportunity of doing it more pertinently. I know it will give great offence to the New England clergy; but the advocate of religious freedom is to expect neither peace nor forgiveness from them. Will you be so good as to examine the answer, and suggest any alterations which might prevent an ill effect, or promote a good one among the people? You understand the temper of those in the North, and can weaken it, therefore, to their stomachs: it is at present seasoned to the Southern taste only. I would ask the favor of you to return it, with the address, in the course of the day or evening. Health & affection. (Emphasis supplied)

From Ford *Works of Thomas Jefferson*, Federal edition, Vol. IX, pp. 346-347 (Putnam, N.Y. 1905).

IMPORTANT POST-BRIEF DISCOVERY–June 29, 1973
Danbury Letter Rough Draft Sheds New Light on Wall

Amicus examined the rough draft with these findings:

(1) The word "eternal" after "a wall of" was deleted. This may have indicated lack of permanent fixity of mind or room for future mobility. People freely talk of separation "of". The letter carefully uses the preposition "between".

(2) After the words "church and state" Jefferson included in his rough draft the sentence shown in footnote 1.

This sentence was omitted in the final draft on advice of Levi Lincoln, as a side note shows. The words "national church" show, ineluctably, that Jefferson feared a fused Church and State.

(3) Powerful lenses and photographic magnification, part of the technique used by Amicus in finding Oregon's missing Establishment provision, are needed to decipher three or four lines Jefferson marked out.

Madison's Memorial and Remonstrances were aimed at taxation not decoration (monuments). Consider well the millions of dollars in aid appropriated by Congress for religious nations. That which shores up and financially aids a religious people in its religious mission may well be more than "political." This could be the "raging torrent" feared by Madison. The command of the First Amendment reads: "Congress shall make *no* law respecting *an* establishment of religion . . ."

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[1] "Congress thus inhibited from acts respecting religion, and the Executive authorized only to execute their acts, I have refrained from prescribing even occasional performances of devotion, prescribed indeed legally where an Executive is the legal head of a *national church*, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect."

APPENDIX "C"

OREGON'S MISSING NO ESTABLISHMENT PROVISION OMITTED FROM 1859 CONSTITUTION THROUGH A CLERK'S ERROR AND DISCOVERED NOVEMBER 17, 1967

Original records of the proceedings of the Oregon Constitutional Convention in 1858 on public file show the Establishment section was adopted by the Convention, but omitted through a Clerk's error in the engrossing.

OREGON CONSTITUTION	INDIANA CONSTITUTION
ARTICLE I, SEC. 2:	ARTICLE I, SEC. 2:
"Freedom of Worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."	"Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."
ARTICLE I, SEC. 3:	ARTICLE I, SEC. 3:
"Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions or interfere with the rights of conscience."	"Freedom of religion. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."
	ARTICLE I, SEC. 4:
OMITTED	"Creedal preference. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent."
ARTICLE I, SEC. 4:	ARTICLE I, SEC. 5:
"No religious qualification for office. No religious test shall be required as a qualification for any office of trust or profit."	"Religious test for office. No religious test shall be required, as a qualification for any office of trust or profit."

ARTICLE I, SEC. 5:

"No money to be appropriated for religion. No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly."

ARTICLE I, SEC. 6:

"No state aid for religious institutions. No money shall be drawn from the treasury, for the benefit of any religious or theological institution."

ARTICLE I, SEC. 6:

"No religious test for witnesses or jurors. No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religeon [sic] nor be questioned in any Court of Justice touching his religeous [sic] belief to affect the weight of his testimony."

ARTICLE I, SEC. 7:

"Religion no bar to competency of witnesses. No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion."

APPENDIX "D"

CITY OF EUGENE
DEPARTMENT OF FINANCING
EUGENE, OREGON 97401

CHARTER AMENDMENT SUBMITTED BY INITIATIVE PETITION TO THE VOTERS OF EUGENE, OREGON

AN ACT

To amend Section 153 of Part I of the Charter of the City of Eugene, Oregon by empowering the City of Eugene to accept a deed of gift of a concrete structure in the form of a cross now located on the south slope of Skinner's Butte Park to be dedicated and maintained as a monument and memorial to United States war veterans and to be named the Veterans War Memorial Cross and authorizing the control and lighting of said structure by the Park and Recreation Department of the City of Eugene.

APPENDIX "D" (continued)
Eugene 1970 Charter Amendment (cont'd)

THE CITY OF EUGENE DOES ORDAIN AS FOLLOWS:

BE IT ENACTED BY THE ELECTORS OF THE CITY OF EUGENE, OREGON, that Section 153 of Part 1, Miscellaneous Provisions of the Eugene City Charter be and the same is hereby amended to add the following provisions thereto:

SECTION 1. That the City of Eugene be and is hereby empowered, and by this Act does, accept a deed of gift of the concrete structure in the form of a cross now located on the south slope of Skinner's Butte Park.

SECTION 2. That the concrete cross structure shall remain at said location and in said form and is hereby dedicated as a memorial and monument to the war veterans of all wars in which the United States has participated and that said memorial shall hereinafter be known as the "Veterans War Memorial Cross."

SECTION 3. That the American Legion, Eugene Post No. 3 be and is hereby authorized at its own expense to prepare and affix to said structure a suitable and fitting plaque and other ornamentations consistent with the intendments of this act.

SECTION 4. That the control and lighting of said structure is hereby designated as a responsibility of the Park and Recreation Department of the City of Eugene and is hereby directed to light on appropriate days or seasons which fittingly represent the patriotic aspects, aspirations and sacrifice of war veterans, including but not limited to, Memorial Day, Independence Day, Thanksgiving, and the Christmas Season, and Veterans Day.

I hereby certify that this is a true and correct copy of Initiative submitted to the voters of the City of Eugene on May 6, 1970, and that the measure passed, with official returns 17,185 votes "Yes" to 6,009 votes "No."

s/s S.P. FLOGSTAD
S.P. Flogstad, City Recorder
June 4, 1970

Seal of
The City
of Eugene

APPENDIX "E"

1970 LIST OF CASES DIRECTLY OR TANGENTIALLY SUPPORTING RESPONDENTS

(Cases 1970-to date appear in Table of Authorities)

Federal Cases

Board of Education Central School Dist. No. 1 v. Allen, 392 US 236; *Zorach v. Clauson*, 343 US 306; *Paul v. Dade County*, 202 So2d 833 (Fla Ct App), cert den Fla Sup Ct 207 So2d 690, cert den 390 US 1041; *Chamberlain v. Dade County Board of Public Instruction*, 143 So2d 21 rev'd other gds 377 US 402, *Lewis v. Allen*, 11 App Div 2nd 447, aff'd NYS 2d 867, cert den 379 US 923; *Smith v. Denny*, 280 F Supp 651 (D.C. Cal 1968); *Protestants and Other Americans United for Separation of Church and State et al v. O'Brien*, 272 F Supp 712 (USDC 1967); *Sheldon v. Fannin*, 221 F Supp 766, 774 (USDC Ariz 1963); *Walz v. Tax Commission of the City of New York*, 397 US 664.

State Cases

Brown v. Heller, 273 NYS 713 (1966); *State ex rel Singelmann v. Morrison*, 57 So2d 238 (Ct App La 1952); *State ex rel Johnson v. Boyd*, 217 Ind 348, 28 NE2d 256 (1940); *Craig v. Mercy Hospital-Street Memorial*, 45 So2d 809, 817 (Miss 1950); *Sawyer v. City of Norfolk, et al* (Virginia Circuit Court, City of Norfolk, Chancery No. 7252-C, 1962); *Tompkins v. Hodgson*, 2 Hun 146 (NY 1874); *Parsons v. Van Wyck*, 56 App Div 329, 67 NYS 1054 (1900); *Brahan v. City of Meridian*, 111 Miss 30, 71 So 170 (1916); *Vale v. City of San Bernardino*, 109 Cal App 102, 292 P 689 (1930); *Baer v. Kolmorgen*, 181 NYS 2d 230 (Sup Ct, NY 1958); *Lawrence v. Buchmueller*, 243 NYS 2d 87 (Sup Ct NY 1963); *Los Angeles County v. Hollinger*, 19 Cal Rptr 648 (DCA Cal 1962); *Koerner v. Borck*, 100 So2d 398 (Fla 1958); *Opinion of the Justices*, 228 A2d 161 (NH 1967).

APPENDIX "F"

BACKGROUND TO EUGENE'S WAR MEMORIAL CROSS CASE

Joined as Plaintiffs in the suit to set aside the Decree in *Lowe* are the private erectors, the City, and American Legion, Eugene Post No. 3. *Lowe* referred to in Judge Ritter's opinion is thus being re-litigated. The case is still in the pleading stage.

Close attention is called to the majority opinion, February 26, 1969, at 451 P.2d 117. The facts show no hint or tint of a religious sect, religious purpose, coercion, oppression or taxation. Mr. Justice Langtry pointed out that in 1966 the defendants in *Lowe* timely raised the park purposes and city charter issue in their pleadings, only to have them stricken and the cause tried solely on "constitutional issues". Then, purporting to "avoid the constitutional issue," the trial judge, The Honorable William Fort, decided the matter on the city charter-park purposes issue, on which defendants had no day in court. Both state statutes and city charter provided for "ornamentation" in public parks. This was one of twenty assigned errors, which included other denials of due process.

During appeal to the Supreme Court of Oregon, Amicus discovered, without laches, the 1934 War Memorial Park Dedication of the park on which the cross is located. Shortly thereafter, Amicus discovered, also, that the Establishment provision, supposed to have gone into the Oregon State Constitution in 1859 and taken from Indiana, was inadvertently omitted. See Appendix C. While the cause was in the United States Supreme Court, the people of Eugene, in a Charter Amendment, overwhelmingly declared the monument itself to be a war memorial. See Appendix D.

CRITIQUE OF DECEMBER 19, 1969, OPINION OF MR. JUSTICE GOODWIN IN *LOWE*, 463 P.2d 361

(1) An assumption of Establishment belies the February 26, 1969 findings of the Court (451 P.2d 1117). The testimony is unequivocal that the donor of the cross, assisted by other Chamber of Commerce members, gave it as a gift to the City. The express purpose in the building permit was "admiration," or beauty–ornamentation–a primary secular purpose. No religious sect or church was involved, nor did the edifice meet any of the indicia of Establishment shown in the Conclusion of this Amicus brief.

(2) The Court's "endorsement" theory, using the school cases (*Engel, McCollum, Schempp, Epperson*) is not apt. No coercion, oppression or use of tax money was shown, nor was any religious sect involved in *Lowe*. Accommodation is the rule today (Walz). *Nowhere* were any ecclesiastical practices shown in the evidence.

(3) Mr. Justice Goodwin's guidelines as to monuments in the opinion controvert both history and impressive judicial precedent. At 463 P.2d 363, the Justice states

> "A public monument depicting a biblical [sic] character or religious symbol would tend to sponsor the religion rather than to honor a famous person."

If "biblical" means a ban on personages of the Old and New Testament, then, is not the Justice showing an unconstitutional bias in disfavoring one religious group for others, or those of no creed–contrary to the creedal no-preference clause found in most state Establishment provisions?[2]

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[2] From Salem, Massachusetts to Washington, D.C. to Miami, to Mobile to New Orleans to Los Angeles to Salem, Oregon, and back,

(4) Cross monuments are universal in extent, ubiquitous in use and multifold in meaning. Three cross litigations in the three different geographical areas show three separate primary secular meanings: *Paul*–Season's Greetings; *Lowe*–Veterans Memorial; and *Meyer*–the peace and order of the Fair.

(5) In avoiding the missing Establishment provision (See Appendix C), the Court read into Article I, Section 5 (a *supplementary* section prohibiting funds from the State Treasury for religious and theological schools and institutions) something beyond the true words, meaning and import of the section. The rule of interpreting a constitution according to its plain meaning is a prime one in constitutional construction. Black, *Handbook on Interpretation of the Laws,* p. 25 (West Pub. Co.). Provisions *in 23 other state constitutions,* similar in sweep and content to Article I, Section 5 (taken from Indiana, also) support the contention of the writer of this brief. Article I, Section 5 was *never* meant, according to the Oregon Founding Fathers, to be a complete Establishment provision. It was meant to augment it. See Carey, *The Oregon Constitution* (Oregon State Printing Plant, 1924.)

(6) No *official* record of the City shows one iota of evidence (nor was any proferred at trial) that the majority of the community viewed the edifice with approval because it "reinforced their religious preferences." The city council records are available and open for inspection. This posture of the Supreme Court of Oregon is in conflict with *McGowan v. Maryland,* 366 U.S. 420, the law of the land, which is neither cited nor

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far and wide, innumerable monuments, including crosses, express the culture, traditions and heritage of the people of the United States.

considered. Said the Supreme Court of the United States in *McGowan* at page 442:

> "The Establishment clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

and at pages 444-445:

> "The fact that this may be of particular significance for the dominant Christian sects does not bar the State from achieving its secular goals."

(7) We must beware lest claims for individual rights work absolute secularism and thus destroy collective rights of the people to full heritage and traditions under the religion proviso. A notable comment by Bernard Coughlin in Religion and the Public Order, Vol. V (1969) seems apt:

> "The Supreme Court has the unenviable task of upholding the principle of Church-State separation on the one hand and allowing policies that encourage the cultural contributions of religion and voluntarism on the other. In the past, the Court has focused on the principle of separation as it affects individual rights, with little express attention directed to the long range cultural implications of its decisions. Nevertheless, there is a favorable climate of opinion and sufficient precedent on which to develop a view of separation that keeps the State and the Church truly separate, and at the same time encourages the social and cultural contributions of the churches. It would seem desirable to develop this precedent if religion and voluntarism are to endure as national values."